IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

No. 74

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cecreham),
Appellee

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF IN REPLY TO MOTION TO DISMISS

Filed by Appellant

Robert O. Brown,
General Counsel for Appellant

Robert E. Rice,
Assistant General Counsel
Duncan, Oklahoma

Of Counsel:
Laurance W. Brooks
James R. Fuller
Charles W. Phillips
William G. Randolph
Frank W. Middleton, Jr.
Robert J. Vandaworker
Tom F. Phillips

Baton Rouge, Louisiana
September 1, 1961

C. Vernon Porter
and
Benjamin B. Taylor, Jr.
% Taylor, Porter, Brooks, Fuller & Phillips, Attys.
1100 La. Nat'l Bank Bldg.
Baton Rouge, Louisiana
Counsel of Record, Upon Whom Service May Be Made

Franklin Press, Inc. Baton Rouge, La.

IN THE

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No. 264

HALLIBURTON OIL WELL CEMENTING COMPANY,
Appellant

versus

JAMES S. REILY, COLLECTOR OF REVENUE, STATE OF LOUISIANA (Since Succeeded by Robert L. Roland, Who Was Duly Succeeded by Roland Cocreham),
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

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May It Please the Court:

FIRST: "Separate, But Almost Equal"

The Louisiana Collector of Revenue argues:

"Louisiana has accomplished an **almost perfect equalization** of the 2% tax burden. . . ."[1]

Like the Louisiana Supreme Court, he contends that the burden upon interstate commerce is "purely incidental."[2] The Collector thus concedes that there is some discrimination against the interstate operator, but he argues that there is ". . . **almost** perfect . . ." equality of treatment, and—in effect—that the "incidental" discrimination is *de minimis*.

1. Motion to Dismiss, p. 9.
2. *Ibid.*, p. 12.

We respectfully submit that the Collector is in error. The issue here is very substantial, not only in the number of dollars involved, but in the number of taxpayers concerned.

Within the scant thirty days from the filing of the Jurisdictional Statement, the following taxpayers filed briefs *amicus curiae:*

1. Humble Oil and Refining Company
2. Chicago Bridge and Iron Company
3. Sperry Rand Corporation (Remington Rand Division)
4. Thomas Jordan, Inc.
5. American Can Company

The sums of money involved for five of the six taxpayers who have appeared herein are:

1. Halliburton Oil Well Cementing Company	$ 40,642.65[3]
2. Humble Oil and Refining Company	18,659.95[4]
3. Chicago Bridge and Iron Company	82,226.41[5]
4. Sperry Rand Corporation	4,710.93[6]
5. Thomas Jordan, Inc.	49,999.24[7]
6. American Can Company (amount not stated)	
Total **(for the tax years now at issue)**	$196,239.18

3. Jurisdictional Statement, p. 68.
4. Humble's Brief *Amicus Curiae*, p. 3. Note that this $18,659.95 is actually included in Chicago Bridge and Iron's $82,226.41. *Ibidem*, fn. 1.
5. Chicago Bridge's Brief *Amicus Curiae*, p. 3.
6. Sperry Rand's Brief *Amicus Curiae*, p. 3.
7. Thomas Jordan's Brief *Amicus Curiae*, p. 2.

And, as Chicago Bridge and Iron put it, "such taxes continue to accrue . . ."[8] from year to year to year.

Of course, the chorus of protest in these *amicus curiae* briefs is only from a representative cross-section of the hundreds of taxpayers who engage in interstate activities reaching into Louisiana and who, therefore—as this Court may judicially notice—are directly affected by the ruling of the Louisiana Supreme Court,—which authorizes heavier taxation upon interstate operators, and lighter taxation upon their purely intrastate competitors.

As this Court may observe—and as the Collector will readily concede—many millions of dollars of taxpayers money hang upon the final determination of this case.

The Collector frankly contends that Louisiana may erect a multi-million-dollar tax barrier at the state border lines, thus openly impeding the flow of interstate commerce. And he argues that he may do this, because the impediment is created by discrimination which is only "incidental." He argues that there is ". . . **almost** perfect equality of treatment," and that this is enough to satisfy the federal constitution.

It is respectfully submitted that the Collector's **"Almost-Equal"** argument is specious, and—further—that it is without foundation in fact

SECOND: The Collector Would Compare the Incomparable.

The Louisiana Supreme Court, adopting the Collector's arguments stated:

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8. Brief, *Amicus Curiae*, at p. 4.

> "The proper comparison would be between the use tax on the assembled equipment and a sales tax on the same equipment **IF** it were sold. . . ."[9]

The Collector develops this misleading comparison at p. 9 of his Motion to Dismiss, viz.,

> "The 2% sales tax and the 2% use tax if applied consistently as the Collector has applied it in this case, will assure that prior to the first use or consumption of any and all tangible property in the state, **such property shall bear a 2% tax burden,** either by virtue of its first sale at retail or by virtue of its first use in the State of Louisiana."
>
> * * *
>
> "Thus, every person in the state who first uses or consumes tangible personal property is placed on an equal economic basis with every other person using or consuming similar property."

We adopt the following clear discussion from the brief, *amicus curiae*, filed by Chicago Bridge and Iron Company:

> ". . . the **comparison suggested by the court is wholly improper.** The assembled equipment was, in fact **not** sold by Halliburton. The absence of discrimination against Halliburton vis-a-vis local competitors who **sell** assembled equipment is immaterial. The damaging discrimination exists with respect to local competitors who, like Halliburton, do **not** sell, but who, unlike Halliburton, fabricate in Louisiana. **The cases that uphold non-discriminatory taxation of interstate commerce do not determine the**

9. Appendix A to Jurisdictional Statement, at p. 64 .

presence or absence of discrimination by comparing the treatment of wholly unlike transactions. On the contrary, their plain teaching is that the determination must be made by comparing the taxation of an interstate transaction with the taxation of an identical transaction carried out entirely within the taxing state. If a State wishes to tax 'the stranger from afar' in respect of what he does outside the state, it must collect no greater toll from him than it collects from one of its own citizens **who does the same things** within its borders. This standard of equality Louisiana has stipulated that it does not meet."[10] (Emphasis supplied.)

The Louisiana Collector has stipulated that Halliburton (or a competitor of Halliburton in exactly the same line of endeavor) would pay no sales or use tax on the labor-and-shop-overhead if it set up its fabrication shops in Louisiana. Indeed, in his Motion to Dismiss, the Collector affirmatively argues that a taxpayer in Halliburton's position could ". . . reduce his tax burden by manufacturing [his] equipment in Louisiana for his own use."[11]

The Collector ignores (and would have the Court ignore) the fact that Halliburton is a **manufacturer, which uses its own work product.** Halliburton is a "manufacturer-user," sometimes called a producer-consumer. The fairness, and legality, of Halliburton's tax burden cannot be determined by comparing its economic activity with that of an intra-state seller or **purchaser-at-retail.**

This is the Collector's basic fallacy. He would argue

10. Chicago Bridge and Iron Company. Brief *Amicus Curiae*, at pp. 5-6.

11. Motion to Dismiss, at p. 10.

that the tax burdens are equal (upon the Louisiana residents and the out-of-state persons) because the sales tax, paid by **a purchaser-at-retail** in Louisiana, includes labor and overhead.

With respect, this is an effort to compare the incomparable. The price paid by a purchaser at retail (upon which a sales tax is paid) includes three elements (a) the cost of the physical parts incorporated in the finished product, (b) the labor and overhead element, and (c) the profit.

It is perfectly proper to compare the sales tax upon a sale-at-retail in Louisiana, with a use tax levied upon property **purchased** outside the state. There the economic act, upon which the incidence of the two taxes fall, is the same. And the tax burden is equal, falling upon all three above-named elements. We concede this.

But this is not what the Collector contends for here. He would compare the economic activity (the business endeavor) of an **out-of-state "manufacturer-user"** (Halliburton) with that of an **intra-state purchaser-at-retail.**

And this is the specious element in the Collector's argument. One cannot fairly compare optical lenses with fried eggs, nor compare peaches with new-born-chicks. To test for discrimination, one must compare the comparable.

We submit that the only fair comparison would be to compare the tax burden of an **out-of-state manufacturer-user,** with the tax burden of an **intra-state manufacturer-user.** In other words, if Halliburton had in Louisiana a direct com-

petitor, in exactly the same operation, would the tax burden of each be the same?

Obviously, the Collector would demand the 2% use tax solely from Halliburton, the out-of-state operator, and he would exempt the intra-state operator. We submit that the Collector's position is discriminatory and illegal; that his position is unsound.

THIRD: The Collector Argues that ". . . the property has not already borne a similar tax . . ." in Any Other State.

At pages 2, 3, and 9, the Collector makes this argument without articulating any conclusion therefrom. For example, at p. 3 the statement, *in toto*, is

> "None of the property has ever been subjected in any other state to a similar tax."

In some obscure way, the Collector seeks freedom to discriminate here because Oklahoma has no Sales Tax.

This argument is wholly fallacious. If Oklahoma had a Sales Tax law, just as Louisiana has, then the sales tax that would have been paid to Oklahoma would have been a 2% tax on the tangible physical parts which were built into the finished equipment. Of course, there would have been no sales tax on the labor-and-shop-overhead element of cost. Thus, when the mobile truck-borne equipment was put in motion and driven up to the Louisiana state line, it would have borne a 2% tax upon its tangible physical parts, but no tax would have been paid upon the labor-and-shop-overhead element of its cost. This is exactly the same situation as that which now exists. A 2% tax has been paid to Louisiana, upon all of the

value of this equipment, except the labor-and-shop-overhead element. Louisiana is demanding a 2% tax on the labor-and-shop-overhead cost of this imported equipment, although, admittedly, it would not have taxed this element of cost in equipment fabricated in Louisiana. Similarly, if Oklahoma had a 2% sales tax, Louisiana would credit the taxpayer with the tax paid to Oklahoma (the tax on the tangible equipment) but would still demand the tax on labor-and-shop-overhead. The Louisiana statute specifically provides that "If the tax paid in another state is not equal to . . . the amount of tax imposed by this chapter . . . ," the importing user must pay the difference. (La. R.S. 47:305. Jurisdictional Statement at p. 82.)

Therefore, it is clear beyond dispute that, if Oklahoma had a Sales Tax law, Louisiana's position would be unchanged. Louisiana would still demand 2% of the labor-and-shop-overhead, and 2% of the interstate transportation cost, while exempting both of these items where the fabrication and travel occurred entirely within Louisiana's borders. *Ergo*—Discrimination against interstate commerce. Whatever point the Collector intended to make here, it is without merit.

FOURTH: A Problem of "Management." Save Louisiana Taxes by Manufacturing in Louisiana.

The Collector argues that for Halliburton, this is

> ". . . not an interstate commerce problem but a problem of management in locating and so arranging its operations in such manner as to reduce its cost of operations to a minimum."[12]

12. Motion to Dismiss, p. 13.

And, he concedes that, if he is sustained here,

> "a taxpayer may reduce his tax burden by manufacturing equipment within Louisiana for his own use."[13]

The Collector thus admits that the tax burden upon the out-of-state taxpayer (the multi-state operator) is not equal to, but is heavier than the burden upon the purely intra-state taxpayer. Yet, again and again he gives lip-service to the "fundamental purpose of equality of the Louisiana Use Tax."[14]

The Collector's argument is incredible. He contends that Louisiana's position is non-discriminatory. Simultaneously he argues that, by good corporate "management," Halliburton could avoid this Louisiana tax by ceasing its interstate movement, and becoming a purely intra-state operator, having its entire operation within Louisiana's borders!!

We respectfully submit that this is a case of gross avowed discrimination against interstate commerce; that there is a most substantial question here which ought to be finally determined by this High Court; that probable jurisdiction should be noted, and this case heard on its merits.

CONCLUSION

If, ". . . the stranger from afar . . ." is to bear a burden no heavier than that of ". . . the resident of Louisiana . . ." (as the Collector concedes, and even argues), then the only comparison that can be made is to compare **the burden which**

13. *Ibid.*, p. 10.
14. *Ibid.*, p. 11.

falls upon the taxpayers in the two cases, by asking three simple questions:

What is the tax burden upon the **out-of-state taxpayer,** the "stranger from afar"?

What is the tax burden upon the **intra-state taxpayer,** the Louisiana resident?

Are these two tax burdens equal?

Obviously the tax burdens are not equal. The Louisiana Collector concedes that his position is discriminatory. He inaccurately argues that this separate tax treatment is "almost equal." He contends that the admitted discrimination is "incidental" and *de minimis*. He argues that Halliburton can reduce its tax burden by moving its plant to Louisiana. He says, "Get out of interstate commerce if you want to avoid this tax."

Appellant submits that this High Court ought to note probable jurisdiction in this case, and articulate a ruling one way or the other. Alabama, Ohio, North Dakota and, apparently, California have ruled that this inequal tax treatment offends the federal Constitution.[15] Louisiana alone rules such open discrimination to be legal and inoffensive. Many thousands of dollars, and a multitude of taxpayers are involved.

We submit that, into this chaotic situation, this High Court can and should lay down its calming rule for the guidance of the thousands of businesses which operate across inter-boundary lines. The question ought not to be left up in the air.

15. See Jurisdictional Statement, at p. 36, *et seq.*

Appellant earnestly submits this Court, having noted probable jurisdiction, should rule that the Constitution of the United States forbids the "**forthright** discrimination" which the Louisiana Collector would practice in this case.

Respectfully submitted,

C. VERNON PORTER
BENJAMIN BROWN TAYLOR, JR.
TOM FORE PHILLIPS

Attorneys for Appellant, Halliburton Oil Well Cementing Company

% Taylor, Porter, Brooks, Fuller & Phillips,
1100 Louisiana National Bank Building
Baton Rouge, Louisiana

Baton Rouge, Louisiana
September 1, 1961

PROOF OF SERVICE

I, Benjamin Brown Taylor, Jr., one of the attorneys for Halliburton Oil Well Cementing Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of September, 1961, I served a copy of the foregoing *Brief In Reply to Motion to Dismiss*, upon the following named persons, by mailing—postage prepaid—a copy thereof to each of them at their offices at the respective addresses set out opposite the name of each, viz.,

(1) Roland Cocreham, Collector of Revenue, Appellee
℅ Chapman Sanford, Attorney of Record
Capital Annex Building
Baton Rouge, Louisiana

(2) Humble Oil and Refining Company, *Amicus Curiae*
℅ Forest M. Darrough, Attorney of Record
1216 Main Street
Houston, Texas

(3) Chicago Bridge and Iron Company, *Amicus Curiae*
℅ Albert L. Hopkins, Attorney of Record
Hopkins, Sutter, Owen, Mulroy and Wentz, Attorneys
One North LaSalle Street
Chicago 2, Illinois

(4) Sperry Rand Corporation, *Amicus Curiae*
℅ Cicero C. Sessions, Attorney of Record
Sessions, Fishman, Rosenson & Shellings, Attorneys
1333 National Bank of Commerce Building
New Orleans 12, Louisiana

(5) Thomas Jordan, Inc., *Amicus Curiae*
% Charles D. Marshall, Attorney of Record
Milling, Saal, Saunders, Benson and Woodward
1122 Whitney Building
New Orleans 12, Louisiana

(6) American Can Company, *Amicus Curiae*
% Ben R. Miller, Attorney of Record
Sanders, Miller, Downing, Rubin and Kean
P. O. Box 1588
Baton Rouge, Louisiana

Benjamin Brown Taylor, Jr.

Baton Rouge, Louisiana
September 1, 1961